No. 6

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1964

AARON HENRY ..... Petitioner

vs.

STATE OF MISSISSIPPI ..... Respondent

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

Petitioner was first convicted at a trial in Bolivar County, Mississippi, on an amended affidavit charging the commission of an offense. That his acts constituted a criminal offense is not an issue here. Under Mississippi procedure, there being a county court in Bolivar County, Mississippi, on appeal to that court he was tried de novo on the same amended affidavit which had been certified up to the county court by a justice of the peace. After conviction in the county court by a jury, sentence was imposed and he then appealed to the Circuit Court of Bolivar County where his conviction was affirmed on the record and any briefs that may have been filed. His case was then reviewed by the Mississippi Supreme Court and his conviction was reversed by a panel of judges of that Court on the ground that corroborative evidence which had been obtained as a result of an unlawful search of petitioner's automobile was admitted at the trial, even though no objection to its admission was made. The failure to object was excused on the ground that

lawyers representing petitioner were from outside the state and were not skilled in the technique of criminal trials in Mississippi, even though an experienced Mississippi lawyer was at the same time representing petitioner. This opinion of the Mississippi Supreme Court was felt to be such a threat to the integrity of trials and procedures in both civil and criminal cases that a suggestion of error and brief in support thereof were filed by the Attorney General of Mississippi (TR. 292 et seq). This brief was an attempt to forcefully point out to the Mississippi Supreme Court the error of its opinion and copies thereof were furnished to all nine members of the Court. After considering the matter en banc, all nine justices voted to sustain the suggestion of error, the original opinion was withdrawn and a new opinion substituted in which the conviction of petitioner was affirmed. *Henry vs. State*, 154 So. 2d 289. It is felt that most of the questions presented by the petition herein insofar as the sufficiency of the evidence and the procedural aspects are concerned are fully answered in this opinion with adequate citation of authority therefor. The Mississippi Supreme Court found that, in line with its previous decisions and those of many other jurisdictions, state and federal, the admission of evidence unlawfully obtained, without objection, in litigation such as this which was at all times highly adversary on the part of petitioner's counsel and in which judicial character was present at all times, did not put the case in that class of cases found to be a judicial farce and to be lacking in fairness and integrity. The Mississippi Court also reaffirmed the doctrine of estoppel under which a defendant cannot complain of the admission of evidence by the state when, as in the case at bar, he also introduced the same evidence by his own witnesses, even including photographs of the interior of petitioner's car.

ARGUMENT

I.

PETITIONER WAS AFFORDED DUE PROCESS OF LAW

Mississippi has for many years followed the federal exclusionary rule of evidence. *Tucker vs. State*, 128 Miss. 211, 90 So. 854. An examination of the multitude of decisions on the subject would reveal that it had perhaps in some cases gone even further than the United States Supreme Court. Nevertheless, Mississippi has always required, as do the federal courts, except in some excusable instances, that a timely objection be made. Under Mississippi practice the time to object is the time at which the evidence is offered. *Henry vs. State*, supra. Even when the United States Supreme Court in *Mapp vs. Ohio*, 367 U. S. 643, extended its rule to all of the states, Mapp recognized that (*Headnote* 9), "As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral challenges to criminal prosecutions must be respected."

Courts considering the proposition have continuously held that such objection or motion must be seasonably made in order to raise the question on appeal. E.g. *People vs. King*, 26 Ill. App. 2d 586, 188 NE 2d 11. Cf. *On Lee vs. United States*, 343 U. S. 747. In *Shorey vs. Maryland*, 177 A 2d 245, cert. den. 371 U. S. 928, singularly like the case at bar, it was said:

> "But the complete answer is that there was no objection in the trial court on the ground of illegal arrest. *Young vs. State*, 220 Md. 95, 99, 151 A 2d 140, cert. den. 363 U. S. 853, 80 Sp. Ct. 1634, 4 L. Ed. 2d 1735. Nor was there any objection to the introduction in evidence of the articles of clothing. *Young vs. State*, supra;

Madison vs. State, 200 Md. 1, 8; 87 A 2d 593; *Lenoir vs. State*, 197 Md. 495, 506, 80 A 2d 3. The majority opinion in the Mapp case seems to recognize (367 U. S. 369, 81 Sp. Ct. 1684, note 9) that state procedural requirements to raise or preserve the question may still be respected, even where it is claimed that the 14th amendment is violated by the introduction of illegally obtained evidence in a state prosecution."

The necessity of a timely objection has been recognized by this Court. *United States of America vs. Atkinson*, 297 U. S. 157, 159. As late as 1962, this Court in *Di Bella vs. U. S.*, 369 U. S. 121, note 9, recognized that under the federal rules, even after a pretrial motion to suppress, to preserve the point for ultimate appeal, the objection on occasion must be renewed. In *Dickie vs. U. S.*, 332 Fed 2d 773 (1964), wherein the 9th Circuit was urged to reverse under the "plain error" rule, that court, citing *Billeci vs. United States*, 9 Cir., 290 Fed 2d 628, 629, refused to do so because no motion to suppress had been made under Rule 41 (e), Billeci holding that the admission of such testimony without objection did not affect the "fairness, integrity, or public reputation of judicial proceedings," reannouncing the rule that evidence which is the product of an illegal seizure is not denied admission in a federal criminal proceeding because it is necessarily untrustworthy but that rather it is, on objection, excluded on the grounds of public policy to discourage overzealous law enforcement officers from resorting to police state tactics.

Therefore, while no such expression in so many words from this Court has been found, the thinking of the 9th Circuit is certainly in line with the reason for the exclusionary rule and has absolutely nothing to do with due process of law. Furthermore, petitioner's three trial

counsel all knew of the necessity of a timely objection. In the suggestion of error filed in the Mississippi Supreme Court, (TR. 227, 228) the writer concluded his suggestion of error with the offer that if either of petitioner's counsel, local or non-resident, would reply thereto with an affidavit that they did not know the necessity of making a timely objection or motion to suppress, the writer would confess that the first opinion of the Mississippi Court was correct. A reply was filed thereto by those self-same three lawyers plus a fourth Mississippi lawyer and the offer was ignored. Therefore, this Court can only conclude that there was a conscious waiver of the right to object.

Furthermore, while this lawyer does not generally approve of the practice of attaching affidavits to appellate briefs, the question of whether or not the failure to object was by ignorance or design having become an issue here, there is attached hereto as an appendix an affidavit of the District Attorney who prosecuted this case to the effect that, when he offered the testimony complained of, because of the unsettled law in Mississippi at the time as to whether or not a wife could waive her husband's constitutional right and consent to a search of his car, he expected an objection and paused at the time and, turning toward the counsel table, saw one of petitioner's counsel, Jawn Sandifer, rise to object, only to be pulled back into his place by his coat tail by other counsel, Robert L. Carter. This Court should be interested to note that this off-the-record matter of fact was charged in the answer to the petition for writ of certiorari filed herein (page 6) and it has not been denied in the brief subsequently filed.

Therefore, the only conclusion that this Court can fairly reach is that the testimony was not objected to for

strategic reasons. This is further indicated by the elaboration on this line of testimony that was put on by petitioner's witnesses at the trial and the much greater detail with which they testified, even to the use of photographs of the interior of petitioner's car. It is plain that, as a matter of strategy, they thought they could shake the testimony of the state's witness. This Court need go no further than *Johnson vs. United States*, 318 U. S. 189, 200, 201, wherein there was a failure to properly object which was obviously not an inadvertence or oversight but where there was a silent approval of the course followed by the trial court accompanied by an express waiver of a prior objection. It was found that counsel conscientiously and intentially failed to save the point involved. This Court very wisely found it unnecessary to set aside rules so necessary to the due and orderly administration of justice and stated:

> "We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened."

This is no attempt by the State of Mississippi to hide behind a rigid enforcement of rules and procedure, but only an effort on the part of Mississippi to retain the integrity of judicial trials.

Nor is this a case of a choice made by counsel not participated in by petitioner of such a type that would warrant review. It is choices of this kind that defendants employ competent counsel to resolve for them. It goes without saying that this very matter of the search of petitioner's car was, of necessity, discussed with petitioner. Otherwise, who furnished the name of the automobile mechanic and others who testified for petitioner about the same items when petitioner put on his defense?

II.

PETITIONER WAS LAWFULLY ARRESTED AND HIS CONVICTION WAS PREDICATED UPON A LEGAL AFFIDAVIT

Petitioner refers to Section 1832, Mississippi Code of 1942, Recompiled, as the foundation of the jurisdiction of a justice of the peace court to try a criminal offense. There is no argument about this matter and the Mississippi Supreme Court in *Henry vs. State*, supra, 154 So. 2d 289, reiterated and discussed this fundamental principle of law. The only question here is whether or not there was an affidavit against petitioner and upon which he was tried. Bearing in mind that the first court of record in which there is a court reporter available was the County Court of Bolivar County, Mississippi, the record shows conclusively that the affidavit which appears in the transcript before this Court was the one upon which petitioner was tried de novo in the County Court. There can be no question before you with respect to the fact that the affidavit upon which the petitioner was tried both in justice of the peace court and county court is the affidavit that appears in the transcript. Reference only needs to be made to the transcript (TR. 65) and to the agreement by attorney Sandifer, one of petitioner's trial counsel, that, "This is the affidavit the defendant was tried on."

No issue being raised as to the sufficiency of that affidavit to charge the offense of which petitioner was convicted, all argument of petitioner with respect to the jurisdiction of the court to try him must necessarily fall. It is further undenied (TR. 63) that, before trial in the justice of the peace court, the County Attorney signed the amended affidavit before the justice of the peace.

gave a copy of the amended affidavit to the attorneys for petitioner and, asking them at that time if they had any objections, they replied, "No."

Thus, petitioner, through his attorneys, waived any further right to question petitioner's trial upon the amended affidavit. Regardless of the acceptance of the amended affidavit by petitioner's counsel, the validity of the amended affidavit under Mississippi law, absent any objection to the form of the affidavit itself, is thoroughly set out in the opinion in *Henry vs. State*, supra, 154 So. 2d 289.

It is respectfully suggested that the approval of this procedure by the Mississippi Supreme Court with respect to the amendment to the affidavit and the trial upon the amended affidavit has not been challenged by petitioner.

Admittedly, petitioner, through his counsel, objected to the absence of the original affidavit. At the time of trial in the chancery court, the original affidavit could not be found in spite of the testimony with respect to its having been made by the prosecuting witness, Sterling Eilert. The proof shows without question that immediately after the offense committed by petitioner, Sterling Eilert signed an affidavit and that as a result thereof the justice of the peace issued the warrant in Bolivar County, Mississippi, which was that evening served upon petitioner in Clarksdale, Coahoma County, Mississippi.

The sum and substance of petitioner's argument is that, to quote from his brief at page 30, "An amended affidavit necessarily presupposes an original and the existence of an original was not established as required by the law of the state."

This is completely refuted by the quotation from the transcript and by the finding of the Mississippi Supreme

Court to the effect that, as revealed by the record before that court, * * * the defendant's attorney admitted that an amended affidavit was properly substituted for the original which was lodged with the justice of the peace on the 14th day of March (the day the defendant was tried in the justice of the peace court). Trials de novo on appeal from a justice of the peace court are, as the Latin phrase implies, completely de novo. An appeal from a guilty plea can even be taken from a justice of the peace court in Mississippi. *Little vs. Wilson*, 189 Miss. 825, 199 So. 72; *Jenkins vs. State*, 96 Miss. 461, 50 So. 495; *Niblett vs. State*, 75 Miss. 105, 21 So. 799. These decisions should well illustrate to this Court the desire of the Mississippi Supreme Court to accord due process to anyone originally tried in a justice of the peace or municipal court.

In his brief before this Court, at page 26 thereof, petitioner states that, "Acceptance of the theory of an amended affidavit by the court below violates petitioner's rights under the due process clause of the 14th Amendment and casts serious doubt upon the impartiality of that tribunal."

The writer of this brief fails to find where any question of partiality or impartiality can be inferred from the "acceptance of the theory of an amended affidavit." On the other hand, as stated hereinabove, petitioner readily accepted the amended affidavit and made no objection.

Therefore, petitioner cannot logically complain of anything that took place after his arrest. Petitioner does argue that his arrest was not valid because the missing original affidavit is unaccounted for and does not show probable cause for his arrest. Petitioner makes no argument that there was anything obtained as the result of an unlawful arrest and which was used to convict him. If the

missing original affidavit against petitioner was so wholly insufficient as to be an unlawful foundation for a warrant of arrest, as pointed out by the Supreme Court of Mississippi, in spite of the fact that the justice of the peace only certified up to the county court the amended affidavit, it was incumbent upon petitioner's counsel to summon the justice of the peace to bring his trial docket into court. *Henry vs. State*, supra, 154 So. 2d 289, 293. As stated by the Mississippi Court, "He (the justice of the peace) may then be required to testify on a preliminary motion to quash and dismiss a criminal charge against the defendant, whether or not there was in fact an affidavit filed or lodged with him."

Furthermore, upon a further reading of the testimony in this case, this Court will be convinced that there was more than enough testimony in the record to indicate to the authorities that petitioner was the guilty party and his identity was definitely established by the check of the license tag of his automobile before he was arrested. Thus, the license tag number, coupled with a description of the automobile and the driver, is more than enough to amount to probable cause to believe that petitioner was the guilty party. In addition thereto, we have the uncontroverted testimony for the State of Mississippi that the prosecuting witness signed an affidavit and that thereafter the justice of the peace issued the warrant charging defendant with this misdemeanor. The warrant was immediately delivered to Officer Charles Reynolds, who, in turn, delivered it to the desk sergeant at Clarksdale, Mississippi. Chief of Police Ben C. Collins secured the warrant and served it upon the defendant at his home.

Therefore, while petitioner does not pitch his argument in that vein, even if the affidavit against him as originally sworn to by the prosecuting witness, was deficient

in law, there appears to be nothing of evidentiary value for the State which was gained as a result of the arrest. How then can petitioner complain, even if the original affidavit had been faulty?

III.

THE PROCEEDINGS BELOW WERE FUNDAMENTALLY FAIR

Petitioner's defense was primarily one of alibi. The jury did not see fit to believe him. There was ample evidence to convict petitioner and, unless this Court, unlike any court before, sees fit to overturn a jury verdict founded on substantial evidence, the conviction of petitioner should stand. It is very easy for the staff of excellent brief writers at the behest of the National Association for the Advancement of Colored People or the American Civil Liberties Union or other such organizations to take a cold printed record of a criminal prosecution and pick flaws, or assumed flaws and take some statement of this Court out of context to support an assignment of error thereon. In spite of this, even a casual reading of the transcript in this case will reveal that petitioner was afforded everything that due process of law could afford him. He was represented by counsel of his choice. These counsel were, presumably, some of the best in the country. R. Jess Brown, of Mississippi, has had wide trial and appellate experience. As stated heretofore to the Court, the experience of Jawn Sandifer is unknown. This Court will readily recognize the name of Robert L. Carter, general counsel for the National Association for the Advancement of Colored People. It goes without saying that, at his trial, petitioner was well represented. It is preposterous that they made a decision in which he did not acquiesce. Petitioner being

who he is, he would either acquiesce in counsel's decision or would insist on other counsel.

Petitioner cites several cases to the effect that the facts found below are not controlling on appeal. It has been held that the evaluation of basic constitutional issues requires this Court to independently evaluate the evidence set forth in the transcript and to determine the merit of the conviction upon that assessment. With these authorities, the State of Mississippi has no argument.

As a matter of fact, the State of Mississippi agrees.

In his petition for certiorari filed herein, petitioner has sought to show, and has been successful, in convincing this Court that his conviction was brought about by his Civil Rights activities. Having been granted certiorari, petitioner has only lightly touched upon this subject in his brief. He would have this Court believe that the only reason that the suggestion of error was sustained by the Mississippi Supreme Court was on account of the fact that it was pointed out therein that his counsel was of the National Association for the Advancement of Colored People. It is certain that this Court will not be misled by such a facetious argument.

Of course, it will be obvious to this Court that the sole reason for pointing out the affiliation of counsel with the National Association for the Advancement of Colored People was to highlight to the Mississippi Supreme Court his vast experience as trial and appellate counsel and his obvious knowledge that seasonable objection to incompetent testimony must be made.

Let this Court be assured that the only interest of the writer of this brief is in the maintaining of some sort of procedure, state or federal, under which it is necessary at some seasonable time to object to the competency of

evidence. This is a dire necessity. It was pointed out to the Mississippi Supreme Court in the suggestion of error filed herein, if the shortcomings of non-resident counsel will avail to reverse on appeal, the smart thing to do is to hire a lawyer that does not know what he is doing.

I do not believe that the Supreme Court of the United States will go that far.

Nor does this writer believe that this Court will take this case as an effort to prosecute (persecute) some one who is active in Civil Rights. The evidence in this case would have been impossible of fabrication. Furthermore, the State of Mississippi, in spite of some "progressive" theories, still takes a dim view of sexual perversion. It is against the law in Mississippi. We feel sure that this will remain an offense. Unless and until this Court decides that the Constitution demands freedom of sex to that extent, it will be a crime. Therefore, regardless of whether or not such activities may be an anathema to such people as petitioner, they will be prosecuted in Mississippi.

It is with difficulty that this Honorable Court is approached on a case of this kind. We have a State, and now a national figure, engaged in Civil Rights activities. The writer of this brief cannot comprehend that this Court will be influenced by the status of a particular individual. However, anticipating any question that might arise in an appellate court, as to which the transcript should be sufficient, the authorities of Mississippi still being desirous of prosecuting petitioner even if this Court reverses his conviction, realizing the difficulty of convicting upon one act of perversion, should this Court see fit to reverse the conviction of Aaron Henry, would

it please make a declaratory judgment as to the admissibility in evidence of previous acts or attempted acts of perversion by petitioner.

CONCLUSION

Wherefore, it is respectfully submitted that petitioner was accorded due process of law and equal protection of the law in every phase of his trial and, failing in that in any phase by the State of Mississippi, his well educated and experienced counsel waived same for him.

Respectfully submitted,

JOE T. PATTERSON, Attorney General
By
G. GARLAND LYELL, JR.
Assistant Attorney General
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Jackson, Mississippi

CERTIFICATE

I, G. Garland Lyell, Jr., Assistant Attorney General of the State of Mississippi, do hereby certify that I have this 24th day of September, A. D. 1964, mailed a copy of the foregoing brief by United States Mail, postage prepaid, to counsel of record for petitioner as follows:

Jack H. Young
115½ North Farish Street
Jackson, Mississippi

R. Jess Brown
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20 West 40th Street
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Assistant Attorney General

APPENDIX

STATE OF MISSISSIPPI
VERSUS
AARON HENRY, Defendant

AFFIDAVIT

Personally appeared before me, the undersigned notary public in and for Quitman County, Mississippi, Hoke Stone, who, having been by me first duly sworn, says on his oath as follows:

(1) That he is the District Attorney in the Eleventh Circuit Court District of Mississippi which embraces the Second Judicial District of Bolivar County, Mississippi, and in that capacity participated in the prosecution of Aaron Henry in the County Court of Bolivar County, Mississippi, on the charge which is now pending on appeal in the United States Supreme Court.

(2) That when Clarksdale, Mississippi, Chief of Police Ben Collins was on the stand as a witness for the State to testify, among other things of material nature in this case, as to what he had found in Aaron Henry's car, all as set out in the record of said case, he, the District Attorney, recognized and had so instructed Chief of Police Collins before he took the stand that the issue of whether or not a wife could waive her husband's right to object to the search of his automobile was then an open question in the State of Mississippi and that an objection on the part of the defense as to this line of testimony might be expected.

(3) That at the point in the examination of Chief of Police Collins when he questioned him as to his findings in the search of the automobile, anticipating objection, he, affiant, paused and turned to the counsel table of the

defense to see one of defendant's counsel, Jawn Sandifer, rise to object before Chief of Police Collins had a chance to answer, and Sandifer was promptly motioned to his seat by the chief of defense counsel, Robert L. Carter, by Robert L. Carter's jerk on the coat tail of Sandifer, returning him to his seat.

(4) That no objection to this testimony was made at any point in the trial by either of the three counsel for the defense but to the contrary, was amplified and exploited by extensive cross-examination of the chief of defense counsel, Robert L. Carter.

/s/ Hoke Stone
Affiant

Sworn to and subscribed before me, the undersigned authority, by Hoke Stone on this the 22nd. day of September, 1964.

/s/ Mrs. Rebecca Eubanks
Notary Public

My Commission Expires:
Date 8-28-66.